Original

No. 8587.

IN THE

Supreme Court

OF THE

State of California.

LUX et al.,

vs.

HAGGIN et al.

Brief, Points and Authorities.

Rest and

BENNETT, WIGGINTON & CREED,
On behalf of Respondents.

Due service and receipt of a copy hereof admitted this 11th *day of March, 1885.*

Stetson & Houghton

Attorneys for Appellants.

Filed this 11 *day of March, 1885.*

J. W. McGarty
Clerk,

By Frank A. Dunn
Deputy Clerk.

H. S. CROCKER & CO., STATIONERS AND PRINTERS, S. F

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By the permission of this Court, as we understand, this case has, very properly as we conceive, been thrown open for discussion to those members of the bar whose clients are interested in the main legal question involved in the former decision of this Court. And, as we have for clients several corporations, which come within the class of water appropriators, and in whose behalf we desire to overthrow the doctrine of riparian rights as applied in the previous decision of this Court in this case, we avail ourselves of the privilege by giving our views in a brief form.

Our argument is based on the fundamental idea that the riparian system of English law is inconsistent with the conditions of climate and soil in a large portion of our State.

The riparian branch of the common law of England—like the whole system of the common law—has been the growth of centuries.

It is adapted to the climate, topography, and meteorological conditions of that country. England, as contrasted with the area of our State, is comparatively but a small country. The mountains are small, and the rivers are small. The quantity of water descending through its rivers and water-courses is but small, when contrasted with the immense floods which are melted from the snows of our mountains, and fall from our skies, and pour down the channels of our rivers. In England there are no immense plains like the Sacramento and San Joaquin valleys, stretching out with almost an uniform surface over thousands of square miles.

The climate of England is proverbial for its moisture. Fogs and mists hang over the land. No necessity of irrigation for raising ordinary agricultural crops exists even in the driest seasons. Of the three hundred and sixty-five days in the year it rains nearly or quite two-thirds of the number. What a contrast its meteorology thus presents with that of California, where no rain falls during six or eight consecutive months of the

productive season of the year. When we take into consideration the mountain chains of our State in connection with its great rivers and their innumerable small sources in the hills, and the vast arid plains through which they flow, and which, without a bountiful supply of water, are almost if not quite as unproductive as the deserts of Sahara are supposed to be, it would seem as if the Almighty had adapted the different portions to each other in such a manner that no portion can be of practicable benefit to man without the exercise of his skill and industry in developing great schemes of irrigation for agricultural purposes. However this may be, it is certain that no just comparison can be instituted between the climatic phenomena and topography of England and those of this State. The common law has gradually grown up into a system suited to the customs, habits and character of the people, as moulded and formed by, and as adapted to, the physical characteristics of the country. Not having been framed in mass, like a Code, but having gradually grown to meet particular exigences as they arose, it could not extend in advance of such exigencies. Now the question whether the rule in respect to riparian rights as claimed to be a part of the common law, would have been extended over England, had it possessed mountains and rivers, and vast plains, barren, without extended systems of irrigation, and, with such systems, fruitful as the Delta of

the Nile, together with the meteorological phenomena of California, never arose, or could possibly have arisen, in the courts of England, as there could not possibly exist circumstances out of which such a question could spring. How, then, can it be contended that this State can be bound by an appendix to, or extension of, the common law of England, never held by the courts of England to be a part of such law, and which could not possibly have been presented to, or passed on, by those courts, and which is inapplicable to the condition of our State, and completely subversive of its prosperity and wealth?

The common law is based upon the actual wants and condition of the society in which it is developed, and never runs ahead of such wants and conditions, in order to apply or extend a principle properly acted upon under one state of facts to an entirely different state of facts and conditions. The application of good sense and sound judgment to existing facts, constitutes the essence of the common law. For this reason it is capable of continuous development, and of adapting itself, without doing injustice, to new circumstances, as they are constantly occurring.

The common law is "the application of the dictates of natural justice and of cultivated reason to particular cases."

(Kent's Comm., 533, top paging)

The Statute of our State adopting the common law reads as follows: (Stat. of 1850, p. 219)—"The

common law of England, so far as it is not repugnant to, or inconsistent with, the constitution of the United States, or the constitution or laws of the State of California, shall be the rule of decision of the courts of this State."

Most, if not all, of the other States have enacted similar statutes, or constitutional provisions.

It will be noticed that these statutes and constitutional provisions, whatever may be the language in which they are couched, have been limited by judicial construction to such portions of the common law, "as are applicable to our situation and government."

(1 Kent, p. 534, top paging.)

So also it is the established doctrine that English statutes passed before the emigration of our ancestors constitute a part of the common law of this country, but this doctrine again is limited to such portions "as are applicable to our situation and government."

(1 Kent 473, original paging, and 535 top paging; see also notes *a* and *b* to p. 535 top paging of Kent, as above cited.)

Bouvier (1 Inst. p. 51,) expresses the same meaning in substance as Kent, by limiting the binding force of the common law in our country to cases in which "it is founded in reason, and is consonant to the genius and manners of the people."

The general doctrine for which we contend was applied in the case of *Waters* vs *Moss*, (12 Cal., 535,) in which it was held that the rule of the common law, which required owners of cattle to keep them confined within their own close, did not prevail in this state.

In *Norris* vs *Harris*, (15 Cal., 252,) Field, C. J., citing in his opinion the passage from Kent above referred to respecting the common law, uses the following language ; "It was imported by the colonists and established as far as it was applicable to their *institutions and circumstances.*"

And again he says (id., ibid.): "As to British Colonies, established in uncultivated regions by emigration from the parent country, the subjects are considered as carrying with them the common law, *so far as it is applicable to their new situation*, so where American citizens emigrate into territory which is unoccupied by civilized man, and *commence the formation of a new government*, they are equally considered as carrying with them *as much* of the same common law, in its modified and improved condition under the influence of modern civilization and republican principles, *as is suited to their new condition and wants.*"

Still more direct and authorative is the doctrine as expounded by the following cases, viz : *Van Ness* vs. *Packard*, 2 Pet. 137; *Wheaton* vs. *Peters*, 8 id. 591; *Town of Paulet* vs. *Clark*, 9 Cranch, 292; which is, that the common law of England is not

to be taken in all respects to be that of America; but that our ancestors brought with them its *general principles*, and claimed it as their birthright; but that they brought with them and adopted *only that portion which was applicable to their situation.*

It is hardly worth while to cite additional authorities in support of this principle. We do not think it is controverted. It has always been acted on where it became properly applicable. Even then, if the riparian doctrine as claimed by our opponents, had constituted a part of the common law of England, it by no means follows that it forms a portion of the common law of California, under conditions and circumstances so diverse from those existing in England. But, as we have before suggested, it cannot fairly be said that this riparian doctrine, to the extent claimed by our opponents, ever existed in England. It certainly was never enforced there to such extent. It could not be, for the conditions and circumstances never existed in England which could give occasion for its application.

The same reasoning from the climate, meteorology and topography of England, which we have above suggested rather than fully traced out, applies in respect to all the old States of our Union. The climate of those States, in all respects appropriate to our argument, closely resembles that of England. They enjoy the same abundance of rain at all seasons of the year, and though having less mists

and fogs, the soil contains at all seasons sufficient moisture to ensure the growth of agricultural crops without artificial irrigation. Prior to the acquisition of California and other territories from Mexico, no portion of our country required for successful agriculture any more moisture than descended in rains and fogs and dews from the heavens. Prior to that time the climate of no part of the country was divided into the dry season and the wet season, as it is in our State

It is thus seen that in none of the old States was found a climate resembling that of California. In all of them it was more nearly analogous to that of England; and in none of them was it divided into wet and dry seasons. Consequently in none of them did the conditions exist out of which could arise the question whether the riparian doctrine was properly applicable where the rights of agriculturists were concerned.

We perceive from the foregoing considerations that no judicial case has ever been brought before the courts of England, or of the States of our country east of the mountains, in which the point now under discussion could have been decided. At least we have never heard of such a case; nor have we been able to find such a case reported in the books. It is in vain to appeal to the riparian doctrine of England and of the Eastern States. The very question here is whether the case supposed is brought, or has ever been brought, within

that doctrine. To assume that it has, is but a begging of the question. All concede, we suppose, the riparian doctrine according to the facts of the cases decided in England and in the Eastern States. But when it is sought to apply it to an entirely different state of facts, we respectfully submit that it ought not to be done.

The naked suggestions above thrown out might be indefinitely filled up with illustration and argument, but we are led to believe that this will be abundantly done by the able and distinguished counsel who appear of record in the case at bar, as well as by others who will probably avail themselves of the privilege granted by the Court.

Respectfully submitted.

BENNETT, WIGGINTON & CREED,

On behalf of Respondents.